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94-582

Supreme Court, U.S.
FILED
OCT 14 1994
OFFICE OF THE CLERK

No. 94-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

SHONG-CHING TONG,
Petitioner,
VS.
ISUZU MOTORS AMERICA, INC.;
EMPLOYERS INSURANCE OF WAUSAU,
Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI AND POINTS AND AUTHORITIES

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12 pp

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TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Shong-Ching Tong Petitions this Court for a Writ of Certiorari for review on this matter following a Decision by the Supreme Court of the State of California that was filed on or about June 22, 1994. Respondent, Isuzu Motors America, Inc. and Employers Insurance of Wausau, in answer to the Petition for Writ of Certiorari, allege and argue as follows:

I.

STATEMENT OF MATERIAL FACTS

Petitioner Shong-Ching Tong is seeking Writ of Certiorari to review the Joint Findings and Order of the California

Workers' Compensation Appeals Board, issued on September 8, 1993. Since the Court of Appeal of the State of California, Second Appellate District, Division 7, and the Supreme Court of the State of California, have appropriately reviewed the lower Court's Finding, Respondents will treat the Petitioner's Petition for Writ of Certiorari as seeking relief from the denial of the Petitioner's Petition for Writ of Review.

The Petitioner is seeking review of the denial of his Petition for Writ of Review essentially solely on the grounds that it was adverse to his interests.

At no time has Petitioner asserted that the Decision was not supported by substantial evidence.

Petitioner filed five different cases before the Workers' Compensation Appeals Board against three separate employers. Testimony was partially completed on October 27, 1992. At that Trial, Petitioner was represented by counsel. A further Trial was scheduled for March 9, 1993, at which time Petitioner was represented by counsel. However, the Petitioner asserted illness and did not appear, causing the Trial not to go forward.

On April 12, 1993, Petitioner dismissed his most recent attorney.

At the Trial of June 14, 1993, the Petitioner appeared In Propria Persona and called a witness, namely Harry Hicks, as a witness in his own behalf. Testimony was taken at the Trial on June 14, 1993, including completion of the cross-examination of the Petitioner by defense counsel.

Contrary to the Petitioner's assertions, at no time did he advise the Workers' Compensation Judge or defense counsel at the time of the June 14, 1993 Trial that he was ill. Following his departure, Petitioner was advised on two or three separate occasions that testimony was continuing and

that he should be present in the hearing room as the trial was proceeding to conclusion.

The Workers' Compensation Judge issued his Findings of Fact that the Petitioner did not sustain an injury arising out of and occurring in the course of his employment. The Judge in his Opinion on Decision, as well as his recommendation on Petition for Reconsideration, indicated that he did not find the Petitioner's testimony to be credible.

The Workers' Compensation Judge relied upon medical opinions which found that the Petitioner's problems were not related to his employment with any of the three named employers.

Petitioner filed a Petition for Reconsideration. The Petitioner failed to serve any of the defendants in this case with a copy of his Petition for Reconsideration. Nevertheless, the Workers' Compensation Appeals Board issued an Order denying the Petitioner's Petition for Reconsideration, and adopted the Opinion of the Workers' Compensation Judge. The Petition then filed a Petition for Writ of Review, which was denied on May 3, 1994.

II.

THE PETITIONER HAS FAILED TO SHOW THAT THE UNITED STATES SUPREME COURT HAS JURISDICTION OVER THIS MATTER.

The Petitioner cites in his Writ for Certiorari the U. S. Constitution, Amendment XIV, Section 1. That Constitutional Amendment states that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of laws.

The Petitioner also cites 28 U.S.C. § 1257, which states that final judgments or decrees rendered by the highest court of a state in which a Decision could be had, may be reviewed by the Supreme Court of the United States by Writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question; or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States; or any title, right, privilege or immunities specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Rule 10 of the Rules of the Supreme Court states that:

> "A review on Writ of Certiorari is not a matter of right, but of judicial discretion. A Petition for a Writ of Certiorari must be granted only when there are special and important reasons therefor."

Illustrative of the character of reasons that will be considered include when a State Court of last resort has decided a Federal question in a way that conflicts with the Decision of another State Court of last resort or of a United States Court of Appeal; and when a State Court of Appeal has decided an important question of Federal law which has not been, but should be, settled by the United States Supreme Court; or has decided a Federal question in a way that conflicts with applicable Decisions of the United States Supreme Court.

The Petitioner has failed in his Petition for Certiorari to show that this case involves an important Federal question which would merit the consideration of the United States Supreme Court. The Decision of the Supreme Court of the State of California to deny the Writ of Review does not draw into question the validity of a statute of the United States. The Petition for Writ of Certiorari does not draw in

question the validity of a statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States. The Petition also fails to show where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or the statutes of, or any commission held or authority exercised under the United States. Petitioner's reference to the XIV Amendment to the Constitution is not supported by any evidence presented to date which would show that the Petitioner was denied due process of law.

III.

PETITIONER ADDED NEW ISSUES IN HIS PETITION FOR WRIT OF CERTIORARI WHICH HE DID NOT BRING UP IN HIS PETITION FOR REVIEW OF THE APPEALS BOARD DECISION.

The Petitioners' Petition for Reconsideration before the Workers' Compensation Appeals Board raised one issue only: that reconsideration should be granted for the purpose of obtaining an independent medical examination. Petitioner raised in his Petition for Writ of Review with the Supreme Court of the State of California, and in his Petition for Writ of Certiorari with the United States Supreme Court, additional issues which were not raised in the Petition for Reconsideration or in the Petition for Writ of Review filed with the California Court of Appeal. Pursuant to California Rules of Court, Rule 29, the State Supreme Court is restricted from considering any issue that could have been, but was not timely raised in the briefs filed in the Court of Appeal. Labor Code § 5904 also provides that the Petitioner for reconsideration shall be deemed to have waived all objections, irregularities and illegalities concerning the matter upon which the reconsideration is sought, other than those set forth in the Petition for Reconsideration.

In the Petition for Writ of Review filed with the Supreme Court of the State of California, the Petitioner raised the issue of fraud in the procurement of the Decision and the issue of the allowance of medical/legal costs. Since the Petitioner was barred from bringing up new issues at the level of the Supreme Court of the State of California, it is clear that the Petitioner may not be present these new issues before the United States Supreme Court, when it failed to present such issues in the Petition for Reconsideration and in the Petition for Writ of Review with the State Appellate Court.

IV.

THE APPEALS BOARD DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

It was held in the case of *Levesque v. WCAB*, 1 Cal.3d 627 (1971), that the review by the Courts should not be extended further than to determine, based on the entire record, whether the Order, Decision or Award was not supported by substantial evidence. Respondents submit that the Order Denying Reconsideration and the denial of the Petition for Writ of Review were based upon the entire record; most particularly, the trier of fact's determination of the credibility of the witnesses.

The Workers' Compensation Judge on numerous occasions, stated that he did not find the Petitioner to be a credible witness. In his Opinion and in his Recommendations Upon Reconsideration, the Workers' Compensation Judge made it quite plain that he found the Petitioner's testimony not to be credible. Clearly, his judgment was based upon his observations of the witness' demeanor over the course of trial on two different dates. The Respondents submit that the opinion of the Workers' Compensation Judge regarding the credibility of the applicant must be

given the great weight it deserves (*Garza v. WCAB*, 3 Cal.3d 312 1970)).

The Petitioner requests the appointment of an independent medical examiner due to the conflicting medical evidence. However, it is well established in Workers' Compensation law that the opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence upon which the Workers' Compensation Judge may rely (*Place v. WCAB*, 3 Cal.3d 378, 90 Cal.Rptr. 424 (1970); *Patterson v. WCAB*, 3 Cal.3d 916, 126 Cal.Rptr. 182 (1975)).

While it is correct that the Appeals Board may within its discretion appoint an independent medical examiner, the Petitioner has requested in his Petitions for Writ of Review and in his Petition for Writ of Certiorari, that the courts at the appellate level apply judgment in an area of discretion which is reserved for the Workers' Compensation Appeals Board.

V.

CONCLUSION

The Order denying reconsideration of the Workers' Compensation Appeals Board, and the denial of the Petitioner's Petition for Writ of Review by the State Appellate Court and Supreme Court are based upon substantial evidence, which is made clear when the entire record is reviewed and the sequence of events is analyzed in conjunction with the Petitioner's testimony and the entire medical record. The Petitioner testified at time of Trial, and his testimony was found not to be credible by the trier of fact. The Petitioner had been represented by counsel until the last day of Trial, when he voluntarily dismissed his counsel. Petitioner's belated claim of illness is clearly self-serving. At no time has the Petitioner claimed that the Decisions were not supported

by substantial evidence; he merely asserts that it was unfair for the Appeals Board not to exercise its discretion to appoint an independent medical examiner. Finally, the Petitioner has failed to show that the United States Supreme Court has jurisdiction over this matter.

WHEREFORE, Respondents pray that the Petition for Writ of Certiorari be summarily denied.

Respectfully submitted this _____ day of October, 1994 in the County of Los Angeles, State of California.

ZONNI, GINOCCHIO & TAYLOR
A Professional Corporation

By: THOMAS E. HANDY
Attorneys for Respondents,
Isuzu Motors America, Inc;
Employers Insurance of Wausau

VERIFICATION

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.:

Under penalty of perjury I declare the truth of the following:

I am the attorney for Respondents ISUZU MOTORS AMERICA INC. and EMPLOYERS INSURANCE OF WAUSAU; I have read the foregoing Answer to Petition for Writ of Certiorari and Points and Authorities and am informed and believe the same is true and on that ground allege that the matters therein stated are true and correct; and that I make this verification because the facts set forth in said Answer are within my knowledge and because as attorney for Respondents, I am more familiar with such facts.

Executed this 13th day of October, 1994 at Glendale, California.

/s/ THOMAS E. HANDY
THOMAS E. HANDY